

## Internal Revenue Service

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Date:  
June 24, 2010

### Legend

Company =

Foreign Country =

B =

C =

Year 1 =

Year 2 =

Dear :

This is in response to your authorized representatives' submission dated January 25, 2010, requesting a ruling that the segregated asset accounts relating to certain variable contracts will meet the requirements of the term "State law or regulation" under § 817(d)(1) of the Internal Revenue Code of 1986. Additional information was submitted in letters dated May 12, and May 18, 2010.

### FACTS

Company was incorporated under Foreign Country law in Year 1 and was licensed to conduct insurance business under Foreign Country law in Year 2. Company issued its first variable contract in Year 2. Company's principal office is located in Foreign Country. Company does not maintain permanent offices in the United States.

Company keeps its books and records on the accrual method of accounting. Company will use a calendar tax year for federal income tax purposes. Company has received approval of its election under § 953(d) of the Internal Revenue Code of 1986 to be taxed as a United States domestic corporation. Company has not yet filed its initial federal income tax return, however, when it does so its return will be consistent with Part I of subchapter L of the Code.

Company was organized to offer variable universal life insurance policies and variable annuity contracts. The cash values or account values which will underlie the variable contracts will be held in one or more segregated accounts which Company has or will establish. Company's initial offering is a private placement variable universal life policy under its Life Policy Program. Once Company is fully operational with its Life Policy Program it intends to develop and offer a variable annuity contract. Company will offer variable contracts and there will not be any general account products. As with all variable universal life policies, the contracts in the Life Policy Program provide that the contract's cash value is allocated to one or more segregated accounts and may increase or decrease and are not guaranteed as to dollar amount. The duration of the contract or the amount of the death benefit may vary based on the investment performance of the segregated accounts.

While Company has not yet developed its variable annuity contract, it intends to offer a contract which can be purchased with a single premium or series of flexible premiums. The contract will contain all of the provisions normally found in a variable annuity contract issued in the United States, e.g., (i) a surrender provision; (ii) payment of a death benefit upon the death of the owner; and (iii) a provision, which permits the contract owner to allocate premiums and account value to one or more segregated accounts. In addition, like the contracts in the Life Policy Program, the variable annuity contract will provide that the contract's account value will be allocated to one or more segregated accounts and that the contract's account value and annuity payments are based on the investment performance of the selected segregated accounts and may increase or decrease and are not guaranteed as to dollar amount. The contracts will provide for annuity payout options which will be based upon recognized mortality tables.

It is anticipated that the majority of insureds and annuitants under the proposed variable contracts will be United States citizens.

Company has established segregated accounts in accordance with the B Act of Foreign Country. This will enable Company to offer a variety of investment options managed by a number of investment managers. Variable contract owners can allocate their premiums and cash value or account value among the segregated accounts available to their class of variable contracts. Thus, each variable contract owner will share pro rata in the assets of the segregated account(s) selected in the same proportion that his or her variable contract's cash value invested in the segregated account bears to the total assets within the segregated account(s). The investment return and market value

of all the assets in a segregated account will be allocated in an identical manner to any variable contract invested in such assets.

Company will account for and maintain separate books and records for each segregated account. When Company engages service providers (e.g., sub-advisers, brokers and custodians that provide investment related services) with respect to the segregated accounts, they will be required to, at all times, keep separate the assets of each segregated account from their own assets and the assets of any other customer, including any other segregated account of Company. The B Act of Foreign Country requires that insurance companies maintain records in accordance with generally accepted accounting principals used in the preparation of financial statements of Company. It also requires that Company prepare or cause to be prepared separate financial statements in respect to each segregated account. Company will adhere to such standards and requirements in maintaining the books and records of the segregated accounts.

The segregated accounts are valued periodically, but no less frequently than monthly, and net asset values per unit are determined. Such unit values are used to determine values and benefits under the variable contracts. Company accounts for and reports values for each variable contract separately.

Company sets the investment objective and establishes investment guidelines for each segregated account. The investment management agreements that Company will enter into with any investment adviser will require that the adviser manage the assets of the segregated account in accordance with the segregated account's investment objective as well as the investment guidelines.

In addition to engaging investment advisers to directly manage the assets of the segregated account, Company intends to enter into participation agreements with insurance dedicated funds which will enable the segregated accounts to purchase the shares of various portfolios of these insurance dedicated funds. Thus, the sole asset of these segregated accounts will be the shares of a single portfolio of the insurance dedicated fund.

The B Act of Foreign Country provides, in part, that any liability linked to a segregated account shall be a liability only of that account and not the liability of any other account. It also provides that the segregated accounts are not part of the general account. The C Act of Foreign Country provides a number of further clarifications of Foreign Country law to include assuring that certain reinsurance proceeds received upon death of an insured are protected from the general creditors of Company.

Company represents as follows:

(a) it has and will continue to, qualify as a life insurance company as defined in § 816 of the Internal Revenue Code of 1986, and that it is, and will continue to be subject to tax under § 801.

(b) the contracts in its Life Policy Program qualify as life insurance contracts under § 7702; and that the variable annuity contracts will be compliant with § 72.

(c) apart from the issue addressed in this ruling request, each of the policies and contracts meet the definition of a variable contract in § 817(d).

(d) the investment operations of the segregated accounts will be conducted in a manner so as to avoid the variable contract owners from being treated as the owners of the assets in the segregated account for U.S. federal income tax purposes.

### RULING REQUESTED

For purposes of § 817(d)(1) of the Code, the separate accounts to which Company allocated and will allocate all or part of the amounts received under the life and annuity contracts which, pursuant to Foreign Country law, are segregated from the general asset accounts of Company, will be treated as accounts that are segregated from the general asset accounts of Company “pursuant to State law or regulation.”

### LAW AND ANALYSIS

Section 817(a) of the Code provides that with respect to variable contracts, increases and decreases in § 807(c) reserves attributable to the appreciation and depreciation in the value of the assets in the segregated asset account are disregarded for purposes of § 807(a) and (b).

Under § 817(b), the basis of each asset in a segregated asset account is increased or decreased by the amount of appreciation or depreciation, to the extent the reserves or other items referred to in § 817(a) are adjusted.

Section 817(c) provides that, for purposes of Part I of subchapter L, a life insurance company which issues variable contracts shall separately account for the various income, exclusion, deduction, asset, reserve, and other liability items attributable to such variable contracts.

Section 817(d) defines the term “variable contract,” for purposes of Part I of subchapter L, as a contract that: (1) “... provides for the allocation of all or part of the amounts received under the contract to an account which, pursuant to State law or regulation, is segregated from the general assets of the company,” (2) provides for the payment of annuities, is a life insurance contract, or provides for funding of insurance on retired lives, as described in § 807(c)(6), and (3) in the case of an annuity contract, the

amounts paid in, or the amounts paid out, reflect the investment return and market value of the segregated asset account, or in the case of a life insurance contract, the amount of the death benefit (or the period of coverage) is adjusted on the basis of the investment return and market value of the segregated asset account, or in the case of funds held under a contract described in § 817(d)(2)(C), the amounts paid in, or the amounts paid out, reflect the investment return and the market value of the segregated asset account.

Section 817(h)(1) of the Code provides that, for purposes of subchapter L, § 72 (relating to annuities), and § 7702(a) (relating to the definition of a life insurance contract), a variable contract (other than a pension contract) which is otherwise described in § 817 and which is based on a segregated asset account shall not be treated as an annuity, endowment, or life insurance contract for any period (and any subsequent period) for which investments made by such account are not, in accordance with regulations prescribed by the Secretary, adequately diversified.

Section 7701 of the Code provides:

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof - ...

(9) United States. The term “United States” when used in a geographic sense includes only the States and the District of Columbia.

(10) State. The term “State” shall be construed to include the District of Columbia, where such construction is needed to carry out the provisions of this title.

Section 953(d) provides:

1) In general. If –

(A) a foreign corporation is a controlled foreign corporation (as defined in § 957(a) by substituting “25 percent or more” for “more than 50 percent” and by using the definition of United States shareholder under § 953(c)(1)(A)),

(B) such foreign corporation would qualify under Part I or Part II of subchapter L for the taxable year as if it were a domestic corporation,

(C) such foreign corporation meets such requirements as the Secretary shall prescribe to ensure that the taxes imposed on it by Chapter 1 of the Code are paid, and

(D) such foreign corporation makes an election to have this paragraph apply and waives all benefits to such corporation granted by the United States under any treaty,

for purposes of this title, such corporation shall be treated as a domestic corporation.<sup>1</sup>

Section 953(e)(5) provides that for purposes of § 953 and § 954, the determination of whether a contract issued by a controlled foreign corporation or a qualified business unit (within the meaning of § 989(a)) is a life insurance contract or an annuity contract shall be made without regard to §§ 72(s), 101(f), 817(h) and 7702 if –

(A) such contract is regulated as a life insurance or annuity contract by the corporation's or unit's home country, and

(B) no policyholder, insured, annuitant, or beneficiary with respect to the contract is a United States person.

The issue presented in this case is whether Company's separate account products are "variable contracts," as defined in § 817(d)(1) of the Code. The difficulty in this case lies in § 817(d)(1) which requires a variable contract to provide "for the allocation of all or part of the amounts received under the contract to an account which, pursuant to State law or regulation, is segregated from the general assets of the companies. (Emphasis added.)" The term "State" is defined in § 7701(a)(9)<sup>2</sup> and (10) which are set forth above. The implication from these paragraphs of § 7701(a) is that the term "State" means that one of the 50 states or the District of Columbia.

This implication is, however, subject to the flush language appearing at the beginning of § 7701(a): "When used in this title, where not otherwise directly expressed or manifestly incompatible with the intent thereof." Section 817(d)(1) does not contain a distinctly expressed meaning for "State," other than one of the 50 states or the District of Columbia. Neither does the legislative history underlying this Code provision. Thus, our task is to determine whether the § 7701(a)(10) meaning of "State" – one of the 50 states or the District of Columbia – is "manifestly incompatible with the intent of [federal tax law]" in the context of § 817(d)(1) and a foreign taxpayer that has elected to come within the provisions of § 953(d).

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<sup>1</sup> Section 953(d)(3) provides an exception to the electing corporation's treatment as a domestic corporation. It provides that, if any corporation treated as a domestic corporation under § 953(d) is treated as a member of an affiliated group for purposes of chapter 6 (relating to consolidated returns), any loss of such corporation shall be treated as a dual consolidated loss for purposes of § 1503(d) without regard to paragraph (2)(B) thereof.

<sup>2</sup> Section 7701(a)(9) is actually a definition of the term "United States." Section 7701(a)(9)'s definition of "United States" helps place § 7701(a)(10)'s definition of "State" in context.

In this case, Company has elected under § 953(d) to be treated for purposes of the federal tax law as a domestic corporation. If Company's separate account contracts are not treated as variable contracts because "State" is given a restrictive meaning, Company and any of their U.S. policyholders will in the following respects be treated differently from a situation involving a domestic life insurance company.

Section 817(c) requires that a life insurance company that issues variable contracts separately account for the "various income, exclusion, deduction, asset, reserve, and other liability items properly attributable to such variable contracts." If Company's contracts are not variable contracts, even though it has separate accounts protected from Company's general creditors, the policyholders and Company will not receive separate account treatment. This would be a major difference between the treatment of a domestic life insurance company and § 953(d) electing company issuing a similar product.

This disparity of treatment is readily seen if we focus on the treatment of the reserves for Company's and a domestic company's separate account products. First, assume that Company's reserves for its separate accounts do not receive the treatment mandated by § 817(a)-(c) for variable contracts. The reserves established by the Company for its life insurance contracts should qualify as life insurance reserves under § 807. Company will be allowed a deduction for increases in the reserve under §§ 805(a)(2) and 807(b) and will be required to include decreases in reserves in gross income under §§ 803(a)(3) and 807(a). The amount of the reserves will be established under § 807(d)(1) as the greater of the net surrender value of the contract or the reserve established under § 807(d)(2).

If the value of the underlying assets held in the separate account increases, the cash surrender value of the contract will increase. Company will be entitled to a deduction for the increase in the reserve. No adjustment will be made to the basis of the assets to reflect the increase in market value. When the assets are sold, Company will recognize a capital gain. Accordingly, the Company will recognize a current deduction when the value of the assets increases and a future capital gain when the assets are disposed. In contrast, life insurance companies that are subject to § 817(a) would not recognize a current deduction for the increase in reserve attributable to the increase in the value of the assets and, due to the basis adjustment provisions of § 817(d), would not recognize any gain on the disposition of the assets.

Conversely, if the value of the assets held in the separate account decreases, the cash surrender value of the contract will decrease. If § 817(a) does not apply to Company, Company unlike domestic life insurance companies subject to the provisions of § 817(a), will be required to include the decrease in reserves in gross income. No adjustment will be made to the basis of the assets to reflect the decrease in market value. When the assets are sold, Company will recognize capital losses. Accordingly,

Company will recognize current ordinary income when the value of the assets decreases and a future capital loss when the assets are disposed.

If Company's separate account products are not treated as variable contracts, its contracts will receive different treatment from domestic contracts under § 817(h) and the regulations thereunder prescribing diversification rules. The diversification rules under § 817(h) only apply to variable contracts (other than pension plan contracts). Thus, if Company's separate account products are not variable contracts, the diversification rules would be inapplicable to them.

The Code's sanction for not meeting the diversification requirements is severe. Section 817(h) provides that, for purposes of subchapter L, § 72, and § 7702(a), a variable contract that does not meet the diversification requirements shall not be treated as an annuity, endowment, or life insurance contract for any period (and any subsequent period) for which the investments made by the segregate asset account are not adequately diversified under regulations prescribed by the Secretary.

The diversification rule of § 817(h) was added to the Code in the Tax Reform Act of 1984. The Senate Finance Committee in 1 S. Pt. 98-169, 98<sup>th</sup> Cong., 2d Sess. 546 (1984), explained the purposes of new § 817(h) as follows:

The bill adopts a provision that grants the Secretary of the Treasury regulatory authority to prescribe diversification standards for investments of segregated assets accounts underlying variable contracts. The diversification requirement is provided in order to discourage the use of tax-preferred variable annuities and variable life insurance primarily as investment vehicles. The committee believes that, by limiting a customer's ability to select specific investments underlying a variable contract, the bill will help ensure that a customer's primary motivation in purchasing the contract is more likely to be the traditional economic protections provided by annuities and life insurance.

If Company's separate account products are denied variable account status, then, as stated above, the diversification rules of § 817(h) and the regulations thereunder will not apply to Company's separate account products. The result will be that Company's separate account products will be recognized as life insurance contracts without meeting the diversification rules of the Code and regulations. Further, Congress' stated purpose in enacting the diversification requirements, to discourage the use of tax-preferred variable annuity and variable life insurance primarily as investment vehicles, would be subverted.<sup>3</sup>

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<sup>3</sup> Cf. United States v. Bardina, 365 F. Supp. 459 (S.D. N.Y. 1973), dealing with the six year statute of limitations, in which the court found reasons, including legislative history, not to use § 7701(a)(9)'s definition of "United States," and instead used a broader definition.



Thus, another anomaly will exist if Company's separate account products are denied variable account status. A foreign insurance company that elected to be treated as a domestic insurance company under § 953(d) would be able to issue separate account products that do not meet the diversification rules, but nevertheless qualify as life, endowment, or annuity contracts. The inside buildup on the electing foreign company's nondiversified contracts would not be subject to current taxation, while the inside buildup on nondiversified contracts issued by domestic companies would be subject to current taxation. This is a dubious result, which does not treat the electing § 953(d) company the same as a domestic company. The electing foreign company is given better treatment and their policyholders given less protection against what Congress saw as an abusive use of separate account products.

The anomalies that we have discussed above with respect to reserves for separate account products and with respect to the diversification standards exist because § 953(d) was added to the Code later than § 817, which was added to the Code in 1984.<sup>4</sup> We conclude, in light of the anomalies whose existence we have demonstrated, the statutory scheme of § 953(d), permitting an electing foreign insurance company to be treated as a domestic insurance company for all purposes (except with respect to dual consolidated losses) is manifestly incompatible with giving "State" a restrictive meaning in § 817(d)(1), and denying variable contract status to Company's separate account products. We conclude that, in the context of electing § 953(d) companies, "State," in § 817(d)(1) should be interpreted broadly enough to include the jurisdiction exercising statutory or regulatory authority over the companies' separate accounts. In this case, that is Foreign Country.

Another provision that further supports our conclusion is § 953(e)(5), set forth above. Section 953(e) was added to the Code in 1998 by section 1005(b)(1)(B) of the Tax and Trade Relief Extension Act of 1998, Pub. L. No. 105-277. If the foreign controlled corporation's separate account products are regulated as life insurance or annuity contracts by the home country and no policyholder, insured annuitant, or beneficiary with respect to the contract is a United States person, the reference to § 817(h) is given a restrictive meaning.

## CONCLUSION

For purposes of § 817(d)(1) of the Code, the separate accounts to which Company allocated and will allocate all or part of the amounts received under life insurance and annuity contracts issued by Company which, pursuant to Foreign Country law, are segregated from the general asset accounts of Company, will be treated as accounts that are segregated from the general asset accounts of Company, "pursuant to State law or regulation."

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<sup>4</sup> Section 953(d) was added to the Code by section 6135(a) of the Technical and Miscellaneous Revenue Act of 1988, effective for tax years beginning after December 31, 1987.

## CAVEATS

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or reference in this ruling letter.

No opinion is expressed or implied concerning any foreign insurance company that has not made an election to be treated as a domestic company under § 953(d)

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the authorization on file with this office, copies of this letter are being sent to your authorized representatives.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

/S/

DONALD J. DREES, JR.  
Senior Technician Reviewer  
(Financial Institutions & Products)